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IN THE

Supreme Court of the United States

October Term 1959

No. 772

DANIEL LESSA and NICHOLAS LESSA,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

A. The Opinion Below

The United States Court of Appeals for the Second Circuit has affirmed the conviction of petitioners and twelve others, after trial by jury in the United States District Court, Southern District of New York, of conspiracy (18 U.S.C. §371) to violate the Narcotic laws, 21 U.S.C. §§173, 174. The opinion of the United States Court of Appeals is set forth in Appendix A and is not yet officially reported.

B. Grounds on Which Jurisdiction of This Court Is Invoked

The jurisdiction of the United States District Court for the Southern District of New York was invoked upon the ground that the crimes charged were violations of the Federal Laws allegedly committed in part within the Southern District of New York. The particular statutes involved are Sections 173 and 174 of Title 21, U. S. Code, and Section 371 of Title 18, U. S. Code.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1), on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

By order of Mr. Justice John M. Harlan of this Court, petitioners' time within which to file this petition was extended to and including March 11, 1960.

Certiorari is further sought on the ground that this case presents questions of federal law which, if determined and clarified here, would immeasurably aid the United States Courts in deciding future cases.

C. Questions Presented

1. Whether the Court of Appeals, in holding the evidence below to be sufficient to sustain a finding of petitioners' participation in a conspiracy to illegally import and sell narcotics, did not render a decision in conflict with the standards of proof laid down by this Court.

2. Whether the conviction below is not in contravention of that portion of the Fifth Amendment to the United States Constitution which provides, " • • • nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; • • • "

3. Whether the trial court properly refused, in its charge to the jury, to point out material inconsistencies in the evidence against petitioners, after doing so in regard to the evidence against other defendants.

D. Constitutional Provisions and Statutes Involved

The Constitutional provisions and Statutes Involved are:

1. The Fifth Amendment to the Constitution of the United States;

2. Title 21, United States Code, Sections 173 and 174.

All of the foregoing are set forth in full in the Appendix B to this petition.

E. Statement of Facts

The indictment herein contained one count charging 37 defendants and 14 others (named as co-conspirators, but not indicted) with the crime of conspiracy (18 U.S.C. §371) to violate Sections 173 and 174 of Title 18, United States Code by importing and smuggling narcotic drugs into the United States, receiving, concealing, possessing, buying and selling those drugs, and to dilute, mix and adulterate

the drugs, and then to distribute them (4a-5a).* Only 17 defendants stood trial. All except one were convicted.

The Government's case was predicated almost entirely upon the testimony of one Nelson Silva Cantellops—an acknowledged member of the conspiracy. At the trial which lasted 51 days, the Government elicited from Cantellops a picture of a vast international network of narcotics smugglers, coupled with a complex system for distribution of the illicit narcotics throughout many principal cities in the United States.

None of the evidence against appellants Daniel Lessa and Nicholas Lessa implicated them in the smuggling activities testified to at the trial. Instead, the Government sought to attach appellants to the distribution scheme following the illicit importation. It is in this latter regard that the Court of Appeals, in upholding their convictions, departed from the theories of this Court as enunciated in *U. S.* v. *Falcone*, 311 U. S. 205 (1940) and *Direct Sales Co.* v. *U. S.*, 319 U. S. 703 (1942), for which reason, among others, we respectfully urge that this petition be granted.

The evidence against appellants came exclusively from two witnesses—the aforesaid Cantellops, and one Peter Contes, a named defendant who testified in behalf of the Government.

Cantellops' contact with the Lessas, the record reveals, was limited to two occasions (27a). Each of the two occasions was in August, 1956 (14a, 19a). On each occasion, Cantellops testified, he delivered to the appellants a package wrapped in brown paper (17a, 21a), which he stated he

* Numbers in parentheses refer to pages of Appellants' Appendix to their Brief below.

knew to contain narcotics (23a). The deliveries were made at the direction of defendants Ormento and Mazzie (14a, 15a, 19a, 23a).

These two interludes mark the beginning and end of Cantellops' testimony regarding appellants.

Contes' testimony regarding appellants covered a period of time prior to the transaction about which Cantellops testified. Contes testified about various purchases of narcotics from appellants during the period commencing in late 1955 or early 1956 (44a) and ending in the first week of August, 1956 (63a). The first purchase was in the amount of three ounces from Daniel Lessa (55a), who agreed in the presence of defendants Ormento and Mazzie to make the sale (56a). At that time, defendant Mazzie suggested to Daniel Lessa that he make the sale (55a).

The delivery of the three ounces of narcotics was made by appellant Nicholas Lessa acting under instruction from appellant Daniel Lessa (57a). Thereafter, however, Contes dealt only with Nicholas Lessa who told him not to deal with Daniel Lessa (58a). These latter transactions covered sales in varying amounts between two and five ounces about every ten days (63a) until the first week of August, 1956, at which time Contes made his final purchase, from Nicholas Lessa, of eight and three quarter ounces of heroin (64a).

This, then, is the essential evidence upon which the Court of Appeals, in its opinion below, held:

> "The appellants Daniel and Nicholas Lessa, Charles Barcellona and Alfredo Aviles all purchased narcotics for resale from one or more of the central conspirators on numerous occasions. This was enough to make them participants in the conspiracy

as it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial."

Appellants made timely motions to dismiss the indictment and for judgment of acquittal (65a), and to set aside the verdict (74a).

F. Arguments in Support of Petition

1. The Learned Court of Appeals, by its decision below, has, following a line of its prior decisions, apparently created a rule of law in the Second Circuit that one who, on two occasions purchased illicit narcotics from persons engaged in a conspiracy to unlawfully import narcotics may be convicted as a participant in that conspiracy merely upon proof that he purchased the narcotics for illicit resale, knowing it to have been illegally imported.

Viewing the evidence below in the light most favorable to the Government, it is apparent that nothing more was proven than appellants, on two occasions, purchased an undisclosed amount of narcotics from two persons who were shown by evidence not connected with appellants to have been participants in a criminal conspiracy to import narcotics for resale in this country. In addition, the evidence further showed that on numerous prior occasions these two appellants had sold large quantities of narcotics to one Peter Contes. There is no proof in the record below as to how appellants disposed of the two quantities purchased subsequent to their dealings with Contes.

From that evidence the learned Court of Appeals found that appellants "purchased narcotics for resale on numerous occasions" and that "it is clear that they knew the nature of the operation." The Court therefore concluded

that "This was enought to make them participants in the conspiracy* * *."

This holding, we submit is in direct conflict with the law as enunciated by this Court's holding in *Direct Sales Co.* v. *U. S., supra.* Moreover, it tends strongly to establish as the law in the Second Circuit that one who engages in the substantive crime of illicit purchase for re-sale of narcotics from persons known to him to have conspired to illegally import those narcotics, may thereby he held to have evinced an intent to participate in the importation conspiracy.

In *Direct Sales Co.* v. *U. S., supra,* this Court affirmed the conspiracy conviction of a mail-order house which had, for a long period of time sold extraordinarily large amounts of morphine tablets to a physician who was peddling them illegally to narcotic addicts. In addition, it appeared that the mail-order house had encouraged such abnormally large purchases by various high-pressure sales methods. It was therein said, at 319 U. S. 713:

> "When the evidence discloses such a system, working in *prolonged cooperation* with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but *joins both mind and hand with him* to make its accomplishment possible. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is *informed and interested cooperation*, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy." (Italics ours)

At page 712 of the same opinion, this Court said:

> "There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy."

Appended as a footnote in the opinion, after the last quoted sentence, appears the following explanation, peculiarly apropos of the facts at bar:

> "This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular, sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase, for whatever end. A considerable degree of carelessness coupled with casual transactions is tolerable outside the boundary of conspiracy. There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase."

One need only to reverse the position of the buyer and seller in the last two quotations to realize their applicability to the situation at bar.

We have thus far assumed, *arguendo*, that the two purchases proven below were sufficient to authorize the finding of knowledge of the *existence of the conspiracy*. Assuming that appellants are chargeable with knowledge that the narcotics were *illegally imported*, there is nothing in the record

from which it may be assumed that appellants knew Cantellops was the agent for an existing conspiracy. Cantellops delivered the narcotics. The record is devoid of any evidence from which it may be ascertained, by inference or otherwise that appellants knew whether Cantellops was agent for a single, unaided smuggler, or whether he acted for a large conspiratorial group.

In reversing the conviction of one of the defendants, Rodriquez, the Court below held:

> "Rodriquez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.
>
> "The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy."

The foregoing, we submit, is completely applicable to these appellants, the sole difference being that appellants made two purchases from Cantellops, rather than one. Surely, the one additional purchase cannot be enough to differentiate between innocence and guilt.

In short, what appears to have occurred below is that yet another door has been opened whereby juries may include in the sweep of a conspiracy indictment substantive violators of the narcotics laws who have been shown to have purchased their illicit drugs on more than one occasion from a

supplier who was part of a conspiracy to illegally import narcotics. This, because two purchases for re-sale are, under the decision below, sufficient to allow an inference of knowledge of the conspiracy and intent to participate therein, whereas one such purchase is not.

We respectfully reiterate that no more was proven against appellants than that they were engaged in buying and selling narcotics as a venture of their own, with no concern, stake or interest in the venture of the proven conspirators. The conspiracy described in the indictment ran the sequential gamut from illicit importation of narcotics to its ultimate consumption by the addict. Forty one months and over fifty participants were encompassed. So sweeping a dragnet could hardly fail to create an undertow sufficient to haul aboard the conspiratorial vessel what at first glance seem to be members of the crew but, upon more scrupulous examination, turn out to be transient mariners operating in adjacent, but dissimilar waters. Whatever else they may be, and however similar their escutcheon, they ought not to have foisted upon them membership in the illicit band.

> "But as it (the charge of conspiracy) is broadened to include more and more (defendants), in varying degrees of attachment to the confederacy, the possibilities for miscarriage of justice to particular individuals becomes greater and greater." (parenthetical comment supplied)
>
> Mr. Justice Rutledge, in *Kotteakos* v. *United States*, 328 U. S. 750, 776.

2. Appellants have been, by the conviction below, twice punished and convicted of the same conspiracy to illegally import and sell narcotics. They were previously convicted, in *U. S.* v. *Stromberg*, 268 F. 2d 256 (2 Cir., June, 1959), cert. den. —U. S. —, of a conspiracy to illegally import and sell narcotics under an indictment which involved a period of 14 months in common with the indictment below. In addition, each of the two indictments named eight persons, among others, as members of "both" conspiracies.

At the close of the Government's case, appellants moved (65a) to dismiss the indictment below on the ground, *inter alia*, that the conspiracy there charged was the same conspiracy for which they had been convicted in *U. S.* v. *Stromberg*, 268 F. 2d 256. The motion was denied as was a similar motion to set aside the jury's verdict on the ground, *inter alia*, of former jeopardy (74a, 75a).

The record in *Stromberg* was before the trial court as well as the Court of Appeals (see, opinion below, Appendix hereto). It has been before this Court in connection with petitions for writ of certiorari which have been denied, as indicated above. We respectfully pray that this Court consider the *Stromberg* record in deciding this petition, or, in the alternative, grant petitioners leave to submit same in connection therewith (*Bartell* v. *U. S.*, 227 U. S. 427, 433).

The indictment at bar charges appellants and "divers other persons to the Grand Jury unknown" and the named co-defendants and co-conspirators with conspiring to violate the narcotics laws (21 U.S.C. §§ 173, 174). The conspiracy allegedly ran from February 1, 1955 to July 7, 1958, the date of return of the indictment. In substance, appellants were charged with conspiring to illegally import and deal in narcotics.

Similarly, the *Stromberg* indictment, which is a matter of record in this Court "in a single count, charged forty-six defendants (including these appellants) and sixteen others under 18 U.S.C. § 371 with conspiring to violate 18 U.S.C. § 212 (bribery of customs officials), 21 U.S.C. §§ 173, 174 (narcotics laws) and to defraud the United States of its right to have the Customs Service administered free from corruption." (*U. S.* v. *Stromberg, supra.*) The period covered by the Stromberg indictment ran from 1950 to May, 1956 (*U. S.* v. *Stromberg, supra*).

Thus, as a matter of record, both conspiracies were identical in scope, viz.: to deal in illegally imported narcotics, and both conspiracies overlapped, in point of time, during the 14 month period from February, 1955 to May, 1956. The fact that the Stromberg indictment also charged bribery of customs officials as part of the conspiracy is not material. (*Short* v. *U. S.*, 4 Cir., 91 F. 2d 614, *Powe* v. *U. S.*, 5 Cir., 11 F. 2d 598.)

That both indictments allege common defendants and co-conspirators, along with others, is, of course, most material in determining any issue of double jeopardy. However, that will be discussed later for the reason that at this stage we assert that even if the other co-conspirators were totally dissimilar, two defendants are "twice put in jeopardy" (*U. S. Constitution, Fifth Amendment*) where they are charged in two indictments with conspiring to deal in illicit narcotics during overlapping periods of time (*Short* v. *U. S., supra*).

We reason, hypothetically, as follows:

Assume A and B are brothers who conspire to engage in illegal selling of narcotics. Over a two year period, until

apprehended, they carry on their business with persons from whom they purchase, and with others to whom they sell. Manifestly, they have committed numerous *substantive* violations of the narcotics laws, each of which might have been punished individually.

The prime question here, whether each transaction constituted a different conspiracy, poses an entirely different problem. Specifically, can the Government convict A and B under one indictment for conspiring to deal with wholesalers C, D and E during the first year of their business, and, in a second indictment, again convict A and B for conspiring to deal with wholesalers F, G and H during the second year of their business? Could the Government, for that matter, compute the number of weeks or months they carried on their business and then predicate an equivalent number of indictments thereon? We submit firstly that such a course of action would contravene the Constitutional guarantee against double jeopardy and, secondly, that that is precisely what has been inflicted upon appellants.

We urge here that where two indictments each allege a continuing conspiracy having the same general objectives during identical or overlapping periods of time, the second indictment constitutes double jeopardy as against those named therein who were placed in jeopardy under the first indictment. This approach is not inconsistent with the theories and expressions which abound in prior cases.

Perhaps the clearest declaration, and that most applicable here, is found in *Short* v. *U. S.*, *supra*, at 91 F. 2d 624:

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the grand jurors unknown' fulfil a useful purpose in the

prosecution of crime, but they must not be used in such a way as to contravene constitutional guarantees. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal *further prosecution of that conspiracy during the period charged is barred*, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it have been committed, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first." (Italics supplied)

Earlier in the same opinion, the Court said at page 620:

"It is well settled that, where a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another prosecution for the same offense alleged as having been committed within a period which overlaps any part of the former period. The reason is that proof of the commission of the offense during the overlapping period is sufficient to sustain a conviction under either of the indictments; and the accused is thus subjected to double jeopardy as to offenses committed within that period."

Thus where, as here, appellants are charged with a general continuing conspiracy to distribute illegally imported narcotics, it is neither illogical nor unreasonable to hold that the indictment must fall as a matter of law since it appears that appellants were previously convicted of conspiring in the same manner and toward the same end dur-

ing an overlapping period of time, even though some of their co-conspirators were not the same in both indictments. So far as appellants are concerned, their single conspiracy between themselves, *i.e.* the business of narcotics, was not altered by the fact that to accomplish the numerous transactions envisaged by them they had to deal at different times with different groups (*Braverman* v. *U. S.*, 317 U. S. 49; *Frohwerk* v. *U. S.*, 249 U. S. 204; *U. S.* v. *Rabinowich*, 238 U. S. 78; *U. S.* v. *Kissel*, 218 U. S. 601, 607).

Analogously, the evidence in the *Stromberg* case and in the case at bar, established, at most, nothing more than that appellants were buying and selling narcotics in the *Stromberg* case from April to November, 1955 (5823) and, in the present case from the latter part of 1955 through August of 1956 (Point I, *supra*). These two overlapping periods of time which the Government seeks to separate into distinct periods, fall within the common temporal area of both indictments. Since, in each case, the proof shows that appellants were pursuing the same objective, there is also met the test frequently enunciated in the cases that former jeopardy is established where the evidence which would support one indictment would also support the other (*Blockburger* v. *U. S.*, 284 U. S. 299; *Ebeling* v. *Morgan*, 237 U. S. 625; *Gavieres* v. *U. S.*, 220 U. S. 338. See, also, *Braverman* v. *U. S.*, 317 U. S. 49).

Those who have been associated with prosecuting or investigating agencies know as this Court must know that lengthy, complex investigations, particularly into continuing conspiracies, all too frequently require mashalling of sporadically acquired fragments of evidence. As a result without fault on the part of the governmental agency in-

volved, what is in fact one overall drama sometimes emerges as multiple scenes, apparently isolated, because minor evidentiary links are yet undiscovered. It is suggested that such a state of events may have occurred here. Else how does it happen that Basile, a Government witness whose testimony in both cases is virtually identical, is regarded by the Government as a co-conspirator in two allegedly unrelated conspiracies? He certainly could not stand twice convicted for the same acts.

Basile implicates Joseph Di Palermo, John Di Pietro and Arthur Alexander in identical fashion in both cases. His direct testimony in the *Stromberg* case is found at pages 924a to 992a of that Appendix. His direct testimony at bar is found at pages 3886 to 3961 of the trial record. Much of his testimony is duplicated in both cases. On each trial he testified that his supplier was Joseph Di Palermo (3914 of instant trial record; 936a of *Stromberg* Appendix); that his tester was Arthur Alexander (3923 of instant trial record; 945a of *Stromberg* Appendix); that Di Palermo's runner was John Di Pietro (3914 of instant trial record; 938a of *Stromberg* Appendix). Di Palermo, Alexander and Di Pietro were also named as co-conspirators in both cases.

Mr. Justice Sutherland, quoting from *Wharton's Criminal Law*, 11th Ed., Section 34, stated in *Blockburger* v. *U. S.*, *supra*, at 284 U. S. 302:

> "The test is whether the individual acts are prohibited, or the course of conduct which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty."

It is therefore submitted that, while in other circumstances a defendant might be found to have simultaneously participated in separate though concurrent conspiracies, such is not, and cannot be, the case here. The *Stromberg* case and the instant case are possessed of too many matching facets to disavow their common mould. The opinion below has overlooked the aforementioned basic principles.

3. The Trial Court, having undertaken to marshall the evidence and having undertaken to point out inconsistencies in the evidence against certain defendants was duty-bound to have pointed out critical, material inconsistencies in the evidence against appellants. Its failure to do so violated fundamental tenets of law as laid down by this Court. This argument, raised below, was not mentioned in the Court of Appeals' opinion below.

Following the conclusion of the Court's charge to the jury, which included a recapitulation of the evidence as to each defendant, counsel for these appellants took exception to the Court's charge. The following appears in the record (73a, 74a):

> "Mr. Brodsky: Your Honor, I respectfully except to the Court's failure on the marshaling of the evidence against the defendants Daniel and Nicholas Lessa to point out the inconsistencies and contradictions in Cantellops' Grand Jury testimony with reference to his transactions with Daniel and Nicholas Lessa as was done by the Court with other defendants on trial. * * *
>
> "I respectfully except to the failure of the Court to point up to the jury the testimony of both Cantellops and Contes elicited on cross-examination, which the Court did with other defendants.
>
> "The Court: The charge of the Court was the longest charge this Court ever delivered and if the Court were to give detailed testimony as to each one

of all sixteen defendants on trial, indeed, we would be here a long time, and then some defense counsel will find that the Court left out a detail.

"I have got your submission.

"Mr. Brodsky: You have my exception."

The quoted colloquy between Court and counsel simultaneously captured, in capsule from, the dangers inherent in any summary of evidence by the Court, and the basic lines of distinction between propriety and error, *i.e,* discretion ever predicated upon elemental fairness (*Stilson* v. *U. S.*, 250 U. S. 583; *Allis* v. *U. S.*, 155 U. S. 117).

The learned Court below chose to point out various inconsistencies in the evidence pertaining to eight of the sixteen defendants.

Yet, when the Court came to review the evidence relating to appellants, no reference was made at all to those facts elicited on cross-examination of Cantellops which not only demonstrated quite perceptible variations between his testimony at the trial and that given by him before the Grand Jury, but which affected the very foundations of the Government's case against appellants.

To illustrate: On direct examination, Cantellops correctly identified both Lessas (12a, 14a). On cross-examination, it developed that in his testimony before the Grand Jury, Cantellops identified a photograph of Daniel Lessa as being that of Nicholas Lessa (33a, 34a), later correcting it upon further questioning (33a, 37a). This went unheralded by the Court, as did the fact that Cantellops when called upon during the trial to identify the defendant Fiano, pointed to Daniel Lessa! (12a); Fiano was acquitted.

To illustrate further: On direct examination, Cantellops testified that he delivered narcotics to both Lessas on two occasions and that both were present on each occasion (18a, 22a). Before the Grand Jury Cantellops testified that he made no deliveries to Daniel Lessa ("Just to Mike"), but Daniel Lessa was present on one occasion (28a). This, too, went unmentioned by the Court, as did two collateral admissions by Cantellops that he lied before the Grand Jury (24a) and that he lied to a Federal Agent because he had to "follow orders from the syndicate first" (24a).

Concededly, the Court's omissions might have far less significance in other circumstances. The materiality in the case at bar derives from a triple coalescence, viz.: (a) the summarization, as to appellants, of the direct testimony only; (b) the clear references, as to other defendants, of inconsistencies in the Government's case, elicited on cross-examination and otherwise; and (c) the borderline quantum of evidence against appellants.

Thus, if Cantellops had mistaken one of the Lessa brothers for the other, it could well have resulted in a serious question in the minds of the jury as to which, if any, of the Lessas Cantellops actually dealt with. This in turn, could have engendered a reasonable doubt as to the guilt of at least one of the Lessas, if not both.

In determining whether the Court's exercise here of its discretion was a fair exercise, the criterion is the possible effect of the offending omissions upon the jury. "The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting" (*Kotteakos* v. *U. S.*, 328 U. S. 750, 764). However, apparent it may be from the record that the Court sought to be

fair to all concerned, it is equally apparent that the jury may have been misled by the Court's frequent allusions to Cantellops' inconsistent statements in his testimony regarding other defendants, as contrasted with his consignment into limbo of what would otherwise have been startling inconsistencies insofar as these appellants are concerned. The jury could have been misled in two ways, either of which, it is urged, afford grounds for reversal. Firstly, assuming that the inconsistencies were nonetheless fresh in the jurors' minds, the glaring elimination of reference to them, after conspicuously referring to other inconsistencies as to other defendants, could not help but appear to the jury that the inconsistencies regarding the Lessas had somehow failed to impress the Court. By speaking only of Cantellops' direct testimony, the Court obscured—if it did not entirely eliminate—the damaging effect of the admissions elicited on cross-examination.

Conversely, if the fact was that the jury had forgotten these aspects of the cross-examination, the Court's failure to remind them of it (again, in comparison with the Court's reminders as to the other defendants) served but to create the illusion that Cantellops' account on direct examination abided with undiminished force.

We do not propose a hypertechnical escape route. What may be harmless error in the prosecution of one or two defendants, or in a briefer trial where the jury's memory is less likely to be submerged in an amorphous mass of testimony and events, assumes greater importance in a prosecution that endured for 51 days. Mass conspiracy trials "are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass" (*Kotteakos v. U. S., supra*, p. 773).

It is not disputed that the Court was free, if it so chose, to refrain entirely from any review of the evidence (*U. S. v. Cohen*, 2 Cir., 145 F. 2d 82). However, having once undertaken the task, a different principle comes into play. In *Starr* v. *U. S.*, 153 U. S. 614, Mr. Justice Fuller, writing of the trial judge's duty in delivering the charge to the jury, said:

> "The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him * * *."

Judge Learned Hand, in upholding the right of a trial judge to avoid reviewing evidence, even in a complex conspiracy case, noted in *U. S. v. Cohen, supra,* at page 92:

> "If the judge had once embarked upon a consideration of the transactions in detail, he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis."

In *Meadows* v. *U. S.*, 82 F. 2d 881, 884, the Circuit Court of Appeals reversed a conviction for assault where the trial court inadequately outlined certain aspects of the evidence relating to the issue of self-defense. The reversal was granted notwithstanding defense counsel's failure to object to the trial court's omissions, so vital did the appellate court regard the necessity for bilateral synopsis of the evidence. The Court said:

> "It is, of course, familiar law that 'to single out and declare the effect of certain facts without consideration of other modifying facts' will constitute prejudicial error (Weddel v. U. S. (C.C.A.), 213 Fed. 208, 210; Urban v. U. S. (C.C.A.), 46 F. 2d 291, 293; Perovitch v. U. S., 205 U. S. 86, 92, 27 S. Ct. 456, 5 L. Ed. 722)."

Among the numerous expressions in the cases touching upon the subject of recapitulation of evidence in the charge to the jury, none seems to have reached the precise question posed here—whether reversible error is committed when, in an involved, lengthy conspiracy trial, the Court details inconsistencies in the Government's case pertaining to certain defendants and declines similar treatment for other defendants, particularly where the unacknowledged inconsistencies deal with the cardinal issues of identification and credibility.

While factual precedent may appear to be lacking, principle is not. The Court below, having imposed upon itself the burden of recapitulating a sprawling conglomeration of evidence, was thereupon duty-bound to include "as well that which makes in favor of a party as that which makes against him" (*Starr* v. *U. S., supra*). It is therefore respectfully submitted that, in the circumstances of this case, the trial court's attenuated analysis of the evidence was reversible error. Clarification of the law regarding the trial court's duty in such situations is needed.

CONCLUSION

The petition for certiorari should be granted and this Court, in the exercise of its powers, should order that the judgments of conviction be reversed and the indictment dismissed or a new trial ordered.

Respectfully submitted,

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and
NATHAN W. MATH
Attorneys for Petitioners

APPENDIX A

Opinion in United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—October Term, 1958.

(Argued September 15, 1959 Decided January 12, 1960.)

Docket No. 25682

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFREDO AVILES, CHARLES BARCELLONA, JEAN CAPECE, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZIE, CARMINE POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, and SALVATORE SANTORA,

Appellants.

Before:

LUMBARD, *Chief Judge,*
CLARK and MOORE, *Circuit Judges.*

Alfredo Aviles and fourteen other defendants appeal from jury convictions in the Southern District of New York, Alexander Bicks, *J.*, presiding, for conspiracy to violate the Narcotic laws, 21 U. S. C. §§173 and 174, and sentences ranging from five to twenty years imprisonment, alleging

insufficiency of proof of a single conspiracy and various errors in the admission of evidence and the conduct of the trial. Affirmed as to all defendants, except Benjamin Rodriquez whose conviction is reversed.

JEROME J. LONDIN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, Herbert B. Greene, Mark F. Hughes, Jr., Robert Price and Robert E. Scher, Assistant United States Attorneys, on the brief) *for appellee.*

SAUL ROTH, New York, N. Y., *for appellant Alfredo Aviles.*

ROY L. REARDON, New York, N. Y., *for appellant Charles Barcellona.*

ALBERT J. KRIEGER, New York, N. Y. (Theodore Krieger, on the brief) *for appellants Jean Capece, Joseph Di Palermo and Benjamin Rodriquez.*

ROBERT R. KAUFMAN, New York, N. Y. (Rudolph Stand, on the brief) *for appellant Charles Di Palermo.*

MAURICE EDELBAUM, New York, N. Y., *for appellants Natale Evola and Vincent Gigante.*

SOLOMON A. KLEIN, New York, N. Y. (Wilfred L. Davis, on the brief) *for appellant Vito Genovese.*

ABRAHAM H. BRODSKY, New York, N. Y., *for appellants Daniel Lessa and Nicholas Lessa.*

HENRY K. CHAPMAN, New York, N. Y., *for appellant Rocco Mazzie.*

DAVID SCHWARTZ, New York, N. Y., *for appellant Carmine A. Polizzano.*

ALLEN S. STIM, New York, N. Y., *for appellant Ralph Polizzano.*

HERBERT S. SEGAL, New York, N. Y. (Osmond K. Fraenkel, on the brief) *for appellant Salvatore Santora.*

LUMBARD, *Chief Judge*:

Alfredo Aviles and fourteen co-defendants appeal their convictions for conspiracy to violate the narcotic laws, 21 U. S. C. Sections 173, 174 and sentences of imprisonment ranging from 5 to 20 years[1] after a three months' jury trial in the Southern District of New York. The indictment named a total of 37 defendants and 14 other co-conspirators, but only 17 defendants stood trial on the charge of conspiracy to import and smuggle narcotic drugs into the United States, to receive, conceal, possess, buy and sell

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[1] Charles Barcellona and Jean Capece received five year sentences; Vincent Gigante and Ralph Polizzano received seven years; Carmine Polizzano—eight years; Alfredo Aviles, Natale Evola and Benjamin Rodriquez—ten years; Charles Di Palermo, Nicholas Lessa and Rocco Mazzie—twelve years; Daniel Lessa—fourteen years; Joseph Di Palermo and Vito Genovese—fifteen years; and Salvatore Santora—twenty years. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese.

the drugs; to dilute, mix and adulterate the drugs prior to their distribution; and to distribute the drugs. Judge Bicks granted the motion of defendant Vento for judgment of acquittal at the end of the case, and the jury acquitted defendant Fiano.

A summary of the evidence shows that there was ample support for the jury's finding of one overall conspiracy to import, distribute, purchase and sell narcotics in violation of law.

The testimony of the principal government witness, Nelson Silva Cantellops, shows that he first joined the conspiracy in March, 1955 and continued serving it in various capacities until July 1, 1957 when he was arrested. His testimony and extensive cross-examination consumed nineteen days of the trial. The government also called defendants Peter Contes, Joseph Basile, and Salvatore Marino who testified that they participated in the sale and distribution of drugs with various appellants, defendants and co-conspirators. The following chronological summary of the evidence of the conspiracy is based on the testimony of Cantellops unless otherwise stated.

In March, 1955 Cantellops attended a meeting at Al's Luncheonette at 34 East 4th Street, New York, with Charles Barcellona, Ralph Polizzano, Carmine Polizzano, Joseph Di Palermo and Anthony Colonna. Cantellops agreed to transport narcotics to Las Vegas for $1000. At the airport bus, while Barcellona was talking to Cantellops, an unidentified man handed Cantellops a package which he took to Las Vegas. In Las Vegas Carmine Polizzano met him and

introduced him to the defendant Fiano to whom he gave the package later that evening. For this delivery of narcotics Cantellops was paid $1000 by Barcellona.

In June, 1955 Cantellops made a trip to Florida to pick up a shipment of narcotics. Carmine Polizzano gave him a bus ticket and money and he went to Miami where he met Carmine Polizzano and drove to Tampa. When the rendezvous in Tampa was unsuccessful, Cantellops and Carmine Polizzano drove to Key West where outside the La Concha Hotel an unidentified man took a suitcase out of his pushcart and placed it in the back seat of the automobile in which Cantellops was waiting. After driving to Miami Cantellops took the train and delivered the narcotics to Ralph Polizzano at the "plant" at 36 East 4th Street, next to Al's Luncheonette, as Carmine Polizzano watched from across the street. For this trip Joseph Di Palermo and Carmine Polizzano paid Cantellops $600 and later he also received an ounce of heroin as a tip.

Cantellops' third trip in August, 1955 took him to Chicago. Carmine Polizzano instructed him about the trip and gave him a package of narcotics from the trunk of a car parked in front of Al's Luncheonette. Cantellops took a bus to Chicago and the day after his arrival met Carmine Polizzano at a bar on Division Street where he was introduced to a man who picked up the narcotics in the booth where Cantellops had placed them. Cantellops and Carmine Polizzano then drove back to New York and, at Joseph Di Palermo's direction, Carmine Polizzano paid Cantellops. Following the Chicago trip, in August and September, 1955, Cantellops distributed narcotics for Ralph Polizzano.

In October, 1955 Carmine Polizzano asked Cantellops to pick up narcotics in Miami. He told Cantellops that if narcotics were not available in Miami he might have to go to Havana to see certain people. Cantellops went to Miami and at the La Concha Hotel met Charles Di Palermo who introduced him to a man named "Cuba." The three men then drove to the La Concha Hotel in Key West and the next day, upon directions from "Cuba," they picked up a suitcase of narcotics in "Cuba's" hotel room and brought the narcotics to New York by train. Back in New York Cantellops delivered the narcotics to Ralph Polizzano at the basement entrance of Al's Luncheonette upon directions from Carmine Polizzano. For this trip Cantellops was paid $250 by Joseph Di Palermo and $350 by Carmine Polizzano, who also arranged for his assistant, John Russo, to give Cantellops an ounce of heroin as a tip.

In October, 1955, upon Carmine Polizzano's directions, Cantellops explored the policy banks in the Eldridge Street area on Manhattan's lower East Side to find out whether these banks might be used as a front for narcotics distributing plants. After Cantellops had explored the policy banks, Carmine Polizzano invited him to a meeting at Ralph Polizzano's apartment on East 4th Street. This meeting was attended by Ralph and Carmine Polizzano, Joseph Di Palermo, John Russo, John Ormento and Benjamin Levine. The group discussed taking over and operating policy banks as a cover for the distribution of narcotics. Cantellops reported that it would cost between $100,000 and $150,000 to purchase the banks in the Eldridge Street area. The group reached no final decision as it was stated that

the matters would have to be discussed with "The Right Man," who, as Cantellops' testimony later developed, turned out to be appellant Vito Genovese. The meeting also discussed the possibility of importing narcotics through Puerto Rico because of turmoil in Cuba and recent misfortunes respecting two shipments by boat. Cantellops suggested the use of the Island of Vieques, off Puerto Rico, as a distributing point.

During the early part of 1956, at the request of Joseph Di Palermo and Carmine Polizzano, Rosario Colletti delivered narcotics to Cantellops who in turn delivered them to John Gonzalez, alias Guayamita, at Gonzalez's apartment at 793 Ninth Avenue, where they were diluted for resale. In June 1956 Cantellops took over Gonzalez' operations and Joseph Di Palermo and the two Polizzanos arranged for Ralph Polizzano to supply Cantellops with the narcotics necessary to expand this business in the Spanish speaking market. Cantellops called Ralph Polizzano when he needed drugs and he picked them up from Russo at Al's Luncheonette or nearby places. While picking up narcotics at the East 4th Street plant Cantellops saw Ralph Polizzano and Charles Di Palermo diluting narcotics. On two occasions during 1956 when Cantellops was in the East 4th Street neighborhood, he saw Vito Genovese talking to Carmine Polizzano and on one of these occasions when Cantellops approached, he was told by Carmine Polizzano "never to interfere when he was talking to 'The Right Man.'" In the summer of 1956 Cantellops, at Ralph Polizzano's request, made other local deliveries of narcotics.

In July, 1956, Cantellops made his fifth out-of-town trip, this time to Cleveland at the behest of Ormento and Carmine Polizzano. Carmine Polizzano introduced Cantellops to appellant Vincent Gigante who drove Cantellops to Lorain, Ohio. At Lorain, Cantellops took the narcotics from behind the spare tire in the automobile trunk and then took them by bus to Cleveland. In Cleveland he met Charles Di Palermo and he delivered the narcotics to an unidentified woman in a taxicab. After Cantellops returned to New York Carmine Polizzano arranged for him to meet Ormento and in Mazzie's presence Ormento paid Cantellops for the trip.

In August, 1956, a sale by Colletti to a narcotic agent resulted in the arrest of Colletti and Russo and the latter was replaced by the defendant Salvatore Marino who thereafter handled narcotics deliveries for the Polizzanos, at the Squeeze-Inn Bar, the plant at 36 East 4th Street and Al's Luncheonette at 34 East 4th Street. Thereafter Marino made frequent deliveries of drugs to Cantellops.

In August, 1956, Cantellops made his third trip to Miami to pick up narcotics. Before the Miami trip there were discussions and meetings at which Ormento offered Cantellops $1,500 to pick up narcotics in Mexico. After Cantellops refused to do this, meetings were held with a man called "Mexican," Mazzie and Carmine Galante regarding the details of a trip to pick up drugs. Cantellops still refused to go to Mexico.

The following evening Cantellops went with Ormento, Mazzie, "Mexican" and the appellant Natale Evola to a

restaurant on East 86th Street. Here Ormento spoke to Genovese and reported back to Cantellops that "The Right Man" wanted to take a look at Cantellops to see if he was all right.

After this Cantellops went to "Mexican's" hotel room somewhere on West 85th Street and discussed the trip to Mexico with the appellant Salvatore Santora, Evola, Mazzie, Ormento and "Mexican." Cantellops persisted in his refusal to go to Mexico but suggested that he go to Miami instead. As the change in plan involved a delay, Ormento gave Cantellops money to entertain "Mexican" in New York City, which Cantellops did for the next three days. After this Cantellops drove with "Mexican" to Miami. The day after their arrival "Mexican" drove Cantellops to Pompano Beach, secured a suitcase in a motel, and gave it to Cantellops. Cantellops then returned to New York by train and later gave the bag to an unidentified man. For this trip Ormento and Mazzie later paid him $950. After this Cantellops made two deliveries of narcotics to Philadelphia. On the first occasion Cantellops delivered three or four pounds of narcotics to a lame man, with Mazzie watching the delivery from a distance. For this Ormento paid Cantellops $350 in the presence of Santora and Mazzie and told Cantellops that Santora would have another trip for him.

A few days later Carmine Polizzano arranged for Cantellops to meet with Ormento, Santora and Mazzie at which time Ormento asked him to deliver narcotics to Philadelphia for Santora. Cantellops was driven to Philadelphia and delivered the narcotics according to instructions. For the

second Philadelphia trip Santora gave money to Ormento who gave it to Cantellops in the presence of Mazzie and Evola. In addition, Cantellops testified to making a Brooklyn delivery for the same group, for which he was paid by Ormento.

In August, 1956, defendant Contes ordered a large quantity of heroin from Nicholas Lessa and Cantellops delivered this to Contes at the request of Mazzie who paid Cantellops for the delivery. The testimony of Peter Contes tended to confirm these transactions.

A few days later Ormento and Mazzie twice sent narcotics to Daniel and Nicholas Lessa, using Cantellops as the messenger. Mazzie supervised the second delivery and Ormento paid Cantellops for both deliveries.

At the end of August, or early September 1956, Cantellops attended a meeting at Mazzie's home at 2332 Seymour Avenue in the Bronx where plans were made for extending the distribution of narcotics. Earlier in the evening Cantellops drove to a German restaurant on East 86th Street with Evola, Ormento, Galante and Andimo Pappadio. After Ormento made a telephone call, they all drove to the West Side Highway and met another car. Cantellops and Ormento entered the other car which was driven by appellant Gigante. Ormento introduced Cantellops to Genovese, who was sitting in the back seat, saying to Genovese "This man is doing a good job for us. He is helping us and doing a good job for us." Ormento told Cantellops "This is the Right Man." Genovese said to Cantellops that they "were going to a meeting where territorial control was to be

discussed," that the people at the meeting were counting on Cantellops to help them and that Cantellops could earn some money by doing so. The two automobiles drove to Mazzie's home and everyone entered except Genovese and Gigante who stayed outside. Evola, Mazzie, Ormento, Pappadio, Galante and Cantellops discussed the distribution of narcotics in the Spanish market in the East Bronx by use of policy banks and sealing off the area to eliminate competing narcotics peddlers and policy banks so that they could control the narcotics traffic in this area. Evola and Pappadio thought that the plan would take a month or a month and a half to complete and the others agreed. After twenty or thirty minutes Genovese came in. He wanted to know "what was the decision in the plan, what they had in mind." When he was told about the discussion which had taken place, Genovese said that he needed this information because he wanted to know when to send his men into the area. Later, in the presence of Evola, Ormento, Pappadio and Galante, Cantellops was advised that he would be the contact man for the distribution of narcotics in this area. Cantellops later delivered narcotics in this area at Ormento's request.

In September, 1956, Ormento and Galante sent Cantellops to Puerto Rico for narcotics. In Puerto Rico he contacted someone named Laurensano who instructed him where to find one Perez on the island of Vieques. When Cantellops met Perez he was given a double marine canvas bag containing narcotics. Cantellops advised Laurensano that he was sending the drugs to three fictitious persons in care of General Delivery, Post Office, New York, and Lau-

rensano advised that he would inform Ormento. Cantellops then mailed the heroin in three packages from three separate post offices. When Cantellops returned to New York Carmine Polizzano arranged to have him meet Ormento who said the drugs had arrived and Ormento paid him for the trip.

After this Cantellops met with Joseph Di Palermo, "Cuba" and a man named Montanez, and Montanez advised that there would be no more shipments from Cuba to Miami and Key West for the rest of the year because of unsettled conditions in Cuba. This meeting took place just a few days before Cantellops was arrested in September, 1956, and he remained in prison until February, 1957.

According to the testimony of three customs inspectors, Joseph Di Palermo, Jean Capece and Salvatore Benanti visited Cuba for two days in November, 1956, and returned to New York on November 20. Jean Capece was searched by a customs inspectress who found $9,000 in new one hundred dollar bills hidden in an undergarment. Jean Capece gave three different stories regarding this money.

When Cantellops left prison in February, 1957, he resumed his narcotics dealings with the Polizzanos, the Di Palermos and Ormento. The appellant Alfredo Aviles became a customer and Cantellops and Marino delivered narcotics to him, Cantellops making his deliveries about once or twice a week from the East 4th Street plant. Aviles paid Cantellops who turned the money over to Ralph Polizzano or Marino and received $100 for each delivery. On one occasion, when Joseph Di Palermo was present, Can-

tellops saw Ralph Polizzano hand to Jean Capece the proceeds of one of these sales to Aviles. Later Aviles bought directly from Ralph Polizzano and Cantellops received commissions on the sales. Aviles in turn resold the drugs which he had purchased from Cantellops and Ralp Polizzano. Marino testified for the government and generally confirmed Cantellops' story about the deliveries and the dealings with Aviles.

Cantellops' fourth and last trip to Miami took place in April, 1957. Joseph Di Palermo and Carmine Polizzano instructed Cantellops to meet Charles Di Palermo in Miami. Carmine Polizzano provided Cantellops with a bus ticket and money and in Miami he met Charles Di Palermo and "Cuba" at the La Concha Hotel. The trio then drove to the La Concha Hotel in Key West. In Key West an unidentified man put luggage in the rear seat of their car and Cantellops and Cuba took this back to Miami in the bus. Here they met Charles Di Palermo and, after rearranging the luggage, Cantellops took the drugs back to New York on the train and delivered them to Carmine Polizzano at the plant on East 4th Street. Later Joseph Di Palermo and Carmine Polizzano paid him about $600 for the trip and he later was given a tip of an ounce of heroin by Marino on Carmine Polizzano's instructions.

At a meeting in May, 1957, in Ralph Polizzano's apartment, there was further talk about sealing up the Eldridge Street territory. Present were Ralph Polizzano, Joseph Di Palermo, Ormento, Cantellops and some friend of Bennie Levine. Cantellops was ordered to start buying up the Spanish policy banks and he attempted to arrange meet-

ings between the owners of these banks and the Polizzanos. Meanwhile Cantellops continued to deliver narcotics for the Polizzanos from the East 4th Street plant until July 1, 1957 when he was arrested.

As we have pointed out, the government called numerous witnesses to corroborate directly and circumstantially the testimony of Cantellops. The three principal supporting accomplice witnesses were Marino, Contes and Joseph Basile, the latter being the same Joseph Basile who was a government witness in *United States* v. *Stromberg*, 268 F. 2d 256, 262 (2 Cir. 1959). Marino testified to a delivery of drugs for Ralph Polizzano on July 5, 1957, and a few hours later the police seized the plant at 36 East 4th Street and found quantities of cocaine and heroin and materials used to dilute, package and distribute these drugs. Marino confirmed Cantellops testimony about the plant at 36 East 4th Street and Al's Luncheonette as centers from which narcotics were distributed by various means. He testified that he delivered narcotics for Ralph Polizzano from the fall of 1956 until his arrest on July 5, 1957.

Peter Contes testified to narcotics transactions involving Daniel Lessa, Nicholas Lessa, Rocco Mazzie and John Ormento. Contes purchased heroin from Daniel Lessa some time later in 1955 or early in 1956 and paid him $900 in the presence of Mazzie and Ormento, after which Nicholas Lessa delivered the narcotics to him. After this Contes made further purchases from Nicholas Lessa in varying amounts up to $2,600. One of Contes' customers was his cousin, Charles Pappalardo, and several days after selling him heroin in April, 1956, both Pappalardo and Contes were

arrested by federal agents who searched Contes' apartment at 318 West 49th Street and found heroin and paraphernalia for diluting and packaging narcotics.

Joseph Basile testified to narcotics dealings which began in August 1955 with the appellant Joseph Di Palermo whom he knew as "Joe Beck." Joseph Di Palermo offered to sell heroin for $8,000 a kilo and cocaine for $400 an ounce. Basile was arrested in November 1955 but jumped bail and went to Europe. When he came back in January of 1956, he ordered half a kilo of heroin and cocaine from Joseph Di Palermo for which he paid $2,000 upon delivery to him by Johnny DePietro, also known as "Johnny The Bug" and the balance of $1,500 at a later date. Basile disposed of the narcotics to his customers. Basile ordered more heroin a few days later at which time Joseph Di Palermo told him that the "goods" came from "Big John" Ormento whom Basile knew. Basile paid Joseph Di Palermo $3,500 in advance for the narcotics which were delivered to him later by Benanti. On another occasion Basile met Joseph Di Palermo and Jean Capece by telephoning Jean Capece at a number which Joseph Di Palermo had given him. Basile ordered half a kilo of narcotics for which he paid $3,500. The narcotics were delivered to Basile in an automobile by "Johnny The Bug" in the presence of Jean Capece and Joseph Di Palermo. Basile took the narcotics to Schenectady and sold it to his customers. He stayed in Schenectady until his arrest on November 10, 1956, but meanwhile he purchased narcotics about once a month from Joseph Di Palermo by telephoning Jean Capece and giving her a message for Joseph Di Palermo or arranging to talk with

him. On one occasion when Basile purchased heroin from Joseph Di Palermo, the package was delivered to him by Charles Di Palermo whom he knew as "Charlie Brody." Basile took the half kilo of heroin to Schenectady and sold it to his customers. On some occasions Joseph Di Palermo delivered narcotics to Basile in New Jersey at the Garden State Diner near the exit of the Garden State Parkway on Route 17.

None of the appellants took the stand before the jury and they called no co-defendant or alleged co-conspirator to rebut directly the strong case of the government.[2]

As is shown by the above summary of the principal testimony in the trial record of over 6700 pages, there was abundant evidence that all of the appellants, except Rodriquez, were part of one conspiracy to import, sell and deliver narcotics. The principal conspirators according to the proof were Vito Genovese, John Ormento, Joseph Di Palermo, Natale Evola, Rocco Mazzie, Carmine Polizzano and Salvatore Santora, among others. Their sources of supply were from such people as James Laurensano, "Montanez," "Cuba" and "Mexican," in Cuba, Mexico and Puerto Rico. According to Cantellops' testimony, he himself went to Puerto Rico and mailed narcotics from there. Of course many of the principal actors not only took part in the importation and transportation of the narcotics,

[2] Only five of the appellants called any witnesses, namely Carmine Polizzano, Mazzie, Gigante, Evola and Rodriquez. These witnesses testified principally regarding Carmine Polizzano's employment, Mazzie's home at Seymour Avenue in the Bronx, Cantellops and his visits to his family, and the Philadelphia neighborhood where Cantellops testified to making a delivery of drugs.

but they had to do with the distribution and delivery of them through others of the appellants such as Jean Capece, Charles Di Palermo, Ralph Polizzano, Vincent Gigante and assistants such as Nelson Cantellops, Salvatore Benanti, John Russo and Salvatore Marino who delivered to Joseph Basile, Peter Contes and William Rovira. The appellant Ralph Polizzano was concerned actively with many of the deliveries and pickups and he seems to have been more or less in charge of the plant and the activities centering around 36 East 4th Street and Al's Luncheonette. Others of the appellants such as Rocco Mazzie and the Lessa brothers, Daniel and Nicholas, had to do with distributing the narcotics to various minor outlets, such as the witness Peter Contes. Others in the group of minor distributors were the appellants Charles Barcellona and Alfredo Aviles.

While the proof is most abundant against those who were active in handling and distributing the narcotics to and from the East 4th Street plant, such as the Polizzano brothers and the Di Palermo brothers, the proof is also sufficient against those who were concerned with the planning and the strategy of the conspiracy and the expansion of its business such as Vito Genovese and Natale Evola.

Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the

conspiracy as one of its principal directing heads. That Genovese was called "The Right Man" by those actively dealing with the distribution of the narcotics and that he acknowledged the name is not without significance in view of his interest and participation in furtherance of the conspiracy.

From all that we have thus far said it follows that there was abundant evidence to implicate appellants Vito Genovese, Joseph Di Palermo, Charles Di Palermo, Carmine Polizzano, Ralph Polizzano, Rocco Mazzie, Natale Evola and Jean Capece. The appellants Daniel and Nicholas Lessa, Charles Barcellona and Alfredo Aviles all purchased narcotics for resale from one or more of the central conspirators on numerous occasions. This was enough to make them participants in the conspiracy as it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial. This leaves for further consideration the sufficiency of the evidence regarding the appellants Santora, Gigante and Rodriquez.

Ralph Santora was sufficiently implicated in the conspiracy by his attendance at several meetings as well as by his use of Cantellops to deliver narcotics to Philadelphia on two occasions, as mentioned above. It was not error for the court to deny the motion of Santora's counsel to strike out Cantellops' testimony about a meeting early in August 1956 in the "Mexican's" hotel room which was attended by Santora, Ormento, Evola, Mazzie, "Mexican" and Cantellops where they discussed a trip to Mexico by Cantellops to bring in narcotics. The trial judge ex-

cluded overt act 15 of the indictment[3] from the jury's consideration, apparently because the proof was at variance as to the location of "Mexican's" hotel. Of course this did not require exclusion of the overt act and we do not understand on what theory the overt act was excluded, but in any event, the exclusion of overt act 15 did not render irrelevant and inadmissible the evidence relating to this meeting since the evidence was relevant to the conspiracy charge.

The court did submit to the jury 17 of the 28 overt acts alleged in the indictment. As there was ample evidence to warrant the jury in finding that one or more of these 17 overt acts was committed in pursuance of the conspiracy nothing turns on any failure of proof regarding overt act 15.

As to Vincent Gigante, we have already referred to his trip to Lorain, Ohio with Cantellops and narcotics for delivery in Cleveland. During the trip Gigante named a number of the alleged conspirators and asked whether Cantellops was acquainted with them. Cantellops complained to Gigante about the risks he was taking in dealing in narcotics. Upon arrival in Lorain, Gigante told Cantellops to get the "stuff" from behind the spare tire and take a bus into Cleveland. The only other evidence relating to Gigante placed him as the driver of the car in which

[3] "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York."

Genovese, Ormento, and Cantellops traveled to the meeting mentioned above at which territorial control was discussed. Gigante apparently took no part in the conversation during this drive and he did not enter the house where the meeting was held. Gigante's participation in this second incident appears to be only as a chauffeur. But his trip to Lorain with Cantellops and his knowledge that narcotics were secreted in the trunk are clear evidence of his participation in the conspiracy. His statements during the trip to Lorain would seem to constitute sufficient evidence of his knowledge of the scope of the conspiracy and of the fact that his activity was in furtherance of a larger venture.

As to the defendant Benjamin Rodriquez, we are of the opinion that there is insufficient evidence of his knowing participation in the conspiracy to have warranted submitting the case against him to the jury. Rodriquez strenuously urges that as to him the record contains evidence only of a single isolated purchase of narcotics from Cantellops, and that that evidence, without any additional showing that he knew of the conspiracy of which Cantellops was a member or intended to join in it, is inadequate to convict him. We agree with this contention.

On direct examination, Cantellops testified that in the middle of September, 1955 he delivered narcotics to Rodriquez near the Progresso Bar in the Bronx. Rodriquez pointed out the person to whom Cantellops was to make the delivery and when they walked past each other he delivered the narcotics. When Cantellops gave testimony again about Rodriquez four days later, he testified about

a delivery of drugs to Rodriquez's runner which he places as occurring in the spring of 1956. The only other evidence against Rodriquez was the testimony of a Treasury Agent that, when Rodriquez was arrested in his home on June 4, 1958, he found three cans of milk sugar and upon analysis one of these cans contained some quinine.

Upon cross examination Cantellops affirmed testimony given by him before the grand jury to the effect that he first delivered narcotics to Rodriquez in the spring of 1956. Cantellops' statement on this point was definite and thus it seems to repudiate his prior direct testimony regarding a September, 1955 delivery. Moreover, his testimony contained no clear statement that there was more than a single delivery to Rodriquez, and no suggestion of any conversation with Rodriquez or other manifestation to him by Cantellops which might have given Rodriquez knowledge as to how Cantellops obtained the narcotics.

A single act may be the foundation for drawing the actor within the ambit of a conspiracy. See, e.g., *United States* v. *Carminati*, 247 F. 2d 640 (2 Cir.), cert. denied 355 U. S. 883 (1957). But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multi-party conspiracy of the sort revealed in the present case, with actors performing many different tasks in many

places, the inference does not necessarily follow from one contact with one member of the conspiracy.

Rodriquez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.

The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriquez knew of the conspiracy and associated himself with it. *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940); *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. Nor was there evidence of a continuous course of dealing between Rodriquez and Cantellops, which might warrant the inference that Rodriquez had some knowledge of the character of the source from which his narcotics came.

We therefore reverse the conviction of Rodriquez and direct the dismissal of the indictment against him.

We now proceed to the consideration of the appellants' numerous claims of error regarding the admission of evi-

dence and the conduct of the trial and rulings of the trial judge.

Cantellops' Prior Perjury and Its Effect on His Trial Testimony

Most of the appellants lay great stress on the character of the witness Cantellops and his admitted perjury before the Grand Jury. They argue that his testimony should have been stricken, that no defendant may be convicted on Cantellops' uncorroborated testimony, and that the indictment should have been dismissed. We do not agree. It was for the jury to judge the witness Cantellops on the basis of all that was brought out about his character, his previous activities, his statements to the government, his testimony before the Grand Jury and before the petit jury.

The jury was fully advised of how Cantellops told his story to government agents and the United States Attorney, of his several appearances before the Grand Jury and the changes and modifications in his testimony there. Cantellops testified for five days on direct examination and for fourteen days on cross-examination. The report of his testimony covers about 2,000 pages of the stenographic minutes. The government made available to defense counsel Cantellops' Grand Jury testimony of 312 pages, two question and answer statements, dated October 10, 1957 and January 16, 1958, records showing Cantellops' visits to the United States Court House, the Veterans Administration's medical records regarding Cantellops, and

Rikers Island medical records when the witness was there incarcerated in 1950 and 1953.

The fact that a witness testified untruthfully at a prior time does not require a finding that he is testifying perjuriously at trial. *United States* v. *Margolis*, 138 F. 2d 1002, 1004 (3 Cir. 1943). It is for the jury to say whether his testimony at trial is truthful, in whole or in part, in the light of the witness' demeanor, his explanations and all the evidence in the case. *United States* v. *Reina*, 242 F. 2d 302, 307 (2 Cir.), *cert. denied* 354 U. S. 913 (1957); *United States* v. *Lennon*, 246 F. 2d 24, 28 (2 Cir.), *cert. denied* 355 U. S. 836 (1957).

Nor is there any merit in the contention that Cantellops' admissions that some of his testimony before the grand jury was untruthful vitiated the indictment. The Supreme Court has held that an indictment is not subject to challenge by reason of the incompetence of evidence presented to the Grand Jury. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." See *Costello* v. *United States*, 350 U. S. 359, 363 (1956).

The further claim is made that the convictions should be reversed because it now appears that Cantellops testified falsely at the trial that no promises had been made to him in return for his testimony. In this connection, affidavits have been filed on this appeal pointing out that on July 1, 1959, three months after the conviction in this case, the Governor of New York commuted Cantellops'

sentence for possession of narcotics. This commutation was granted at the request of the United States Attorney because of Cantellops' assistance to the government in narcotics prosecutions. It does not follow from the action of the United States Attorney and the action of the Governor that any promise was made to the witness. It is a well understood practice for the prosecutor and the chief executive concerned to give appropriate consideration to witnesses who have assisted the government. The witnesses concerned are aware that this is so; the jurors and the general public are also aware of this practice. The purpose of the government is to encourage witnesses to tell what they know; that may be accomplished without prior promise in a particular case. Consequently we do not conclude from the fact of the Governor's commutation that Cantellops was testifying falsely when he disclaimed any promise. Surely it could have been no surprise to anyone that the witness was later shown some consideration; the jury knew that Cantellops hoped for such a result and that the jury gave this due weight can hardly be doubted in the light of the cross-examination on this subject and the arguments made by defense counsel in their summations.

The Interruption of Cantellops' Cross-Examination

The appellants complain that the trial judge erroneously interfered with their cross-examination of Cantellops because the judge permitted the witness to speak to his young daughter at the end of one day and to speak to court-assigned counsel during recess on the following day. These

rulings were well within the proper discretion of the trial judge. There was no showing that these talks had to do with the substance of the witness' testimony and the argument that they unduly interfered with the right to cross-examine, or were in any way prejudicial, has no substance whatever.

On February 10, in the midst of a four weeks cross-examination which began January 30, Cantellops was shown a letter he had written his daughter in which he said he "intended" to be released from prison around Christmas 1958. Later that day the court was informed that Cantellops, fearing for his daughter's safety, wished to see her. Cantellops thereafter talked to his daughter on the telephone although he did not see her. Certainly, under these circumstances and in light of the exceptional length of cross-examination, it was well within the trial court's discretion to release Cantellops from sequestration to speak with his daughter. See *Kaufman* v. *United States*, 163 F. 2d 404, 408 (6 Cir. 1947).

The next day, following assertion by Cantellops that he was worried about his constitutional rights, the judge assigned Arnold Fraiman, Esq. as counsel and Cantellops conferred with him during recess the following day and advised him to answer certain questions which had been asked him. This course of procedure was entirely proper. No delay was involved, and the witness in fact answered all the questions asked him. The complaint of undue interference with cross-examination is frivolous. Indeed the court was exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of

permitting considerable repetition and minute inquiry into many matters of doubtful relevance.

The Testimony of Ralph Polizzano's Admissions

Ralph Polizzano complains that the court should have granted him a mistrial because of the introduction of the testimony of James H. Gibbon, of the New York City Police Narcotics Squad, regarding admissions made by Polizzano to Gibbon. After hearing evidence, not in the jury's presence, the court rejected the claim that the admissions had been coerced.

Gibbon testified that after he arrested Ralph Polizzano on July 6, 1957, he went with Polizzano to his apartment #2 on the ground floor of 36 East 4th Street and that the latter told him the "junk" was on top of the cabinet in a black zipper case, and that the cutting apparatus and scales were in another room.

Salvatore Marino then testified to making a delivery of narcotics from the apartment at 36 East 4th Street for Ralph Polizzano before his arrest the night of July 5. On cross-examination Marino claimed that in the police station he was punched in the stomach by the arresting officer and two other officers for five or ten minutes and was knocked out. He claimed he saw two or three other officers strike Ralph Polizzano in the stomach.

Not until this point in the trial did counsel for Ralph Polizzano move to exclude Gibbon's testimony of the oral admissions on the ground they were made under duress.

Counsel asked for a hearing and for a mistrial if the court should find for Ralph Polizzano on these questions.

The trial judge could have denied the motions on the ground that they were untimely made. As it was, he granted a hearing at which Polizzano testified. From the discrepancies in the testimony of Marino and Polizzano, Polizzano's failure to complain earlier, his plea of guilty to a state narcotics charge based on the same facts, and the police medical records, there was ample reason for the judge to deny the motions as he did. Nevertheless he charged the jury that they were to disregard the admissions if they found them to have been made for fear of bodily harm, and that, in any event, they were to be considered solely against Ralph Polizzano. We find no error in these rulings.

Aviles' Postarrest Statement Regarding Ralph Polizzano

Ralph Polizzano also complains of the admission in evidence, over his objection, of an unsigned statement of appellant Aviles made after the latter's arrest on June 3, 1958. In this statement Aviles referred to a meeting with "Ralph" at the Squeeze-Inn Bar, related that Ralph wanted him to buy stuff directly from him instead of the Spanish fellow who had introduced him and stated that the stuff he bought from Ralph was delivered by a man he called "Junior." When the judge overruled the objection to admission of the exhibit, Ralph Polizzano's counsel sought to have the name "Ralph" deleted or to have "a man" substituted, but this application was also denied. The judge

did instruct the jury three times immediately preceding and following admission of the statement that it was to be considered only against Aviles and repeated this admonition twice in instructing the jury. We find no error in the admission of the statement in evidence in view of the judge's careful and repeated instructions.

The government may introduce admissions of one defendant even though other defendants on trial are implicated, provided the jury is carefully and clearly instructed that the admission can be considered only against the declarant. *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); *United States* v. *Bando*, 244 F. 2d 833, 838-9 (2 Cir.), *cert. denied* 355 U. S. 844 (1957). While it might have been the better practice under these circumstances to have deleted the name "Ralph" from the statement before admitting it in evidence, so as not to run the risk of unnecessarily focusing attention on Polizzano, we see no reason to presume that the jury disregarded the judge's repeated instructions as to the use to be made of the admissions.[4]

Barcellona's Right to Counsel

Appellant Barcellona complains that he was denied counsel in violation of his right under the Sixth Amendment which guarantees that "In all criminal prosecutions, the accused * * * shall enjoy the right to have the assistance of counsel for his defence," and under Rule 44, Federal Rules of Criminal Procedure. We think appellant was

[4] We do not overlook the fact that when the jury asked for the Aviles statement during its deliberations the trial judge directed the deletion of "Ralph" before sending the exhibit to the jury.

adequately represented. It is true that Barcellona was without counsel from the time he appeared in the district court on July 16, 1958 until November 25, 1958, when the court assigned Roy Reardon, Esq. to represent him. But the trial did not commence until January 5, 1959 and thus his counsel had six weeks in which to prepare. This was ample assistance of counsel in view of the fact that Barcellona does not advise us in what respect he was prejudiced by his lack of counsel prior to November 25, 1959. Furthermore, he was given the benefit of all motions made by other counsel during pre-trial. So far as appears, all was done that needed to be done and could be done on his behalf. While there is language in the cases that an accused is entitled to counsel "for any part of the pretrial proceedings" this is always coupled with the qualification that there is no error unless "he is so prejudiced [by the absence of counsel] as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" *Crooker* v. *California,* 357 U. S. 433, 439 (1958).

Defendant Fiano's Courtroom Outburst

On March 11, when the government was adducing evidence as to defendant Fiano's birthday, Fiano burst into a tirade before the jury in which he asserted that all those on trial were convicts and that some were then serving time in prison. All defense counsel immediately moved for a mistrial. In the course of these motions counsel for Jean Capece asserted that this defendant had no criminal record, which led to further motions for a mistrial. The appellants

claim that the Fiano outburst was provoked by the government, but there is no warrant for this assertion. In the context of the questioning then in progress, Fiano's birthday was a relevant line of inquiry. Following the outburst, Judge Bicks promptly instructed the jury to disregard Fiano's statements, and also told the jury that they were not to assume from the remarks of Capece's counsel that any other defendants had a criminal record. Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper. See, e.g. *United States* v. *Stromberg,* 268 F. 2d 256, 269 (2 Cir. 1959); *Reistroffer* v. *United States,* 258 F. 2d 379, 392-93 (8 Cir. 1958), *cert. denied* 358 U. S. 927 (1959).

Double Jeopardy Claims of Daniel and Nicholas Lessa and Joseph Di Palermo

Appellants Daniel and Nicholas Lessa claim that the trial court should have granted their motions for acquittal on the ground that they were twice placed in jeopardy because they had already been convicted for the same acts in *United States* v. *Stromberg,* 268 F. 2d 256 (2 Cir. 1959). In that case the evidence showed that the Lessas received their supply from Vellucci, through runners Ewing and Tedesco, until Vellucci was arrested in November 1955.

It was only after that that they turned to the defendant Ormento for their supply. Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one.

Analysis of the *Stromberg* record and comparison with the proof in this case shows that the two conspiracies were entirely different enterprises in all respects, their principals, the source of their drugs, the means and places of importation, their distribution points, and the centers from which they operated in Manhattan.

Joseph Di Palermo, also indicted in the *Stromberg* conspiracy, likewise claims double jeopardy. As he was not placed on trial in Stromberg since he was then a fugitive, he has obviously not twice been placed in jeopardy.[5]

The Simultaneous Trial of 17 Defendants

The complaint that the individual defendants could not receive sufficient individual consideration at a trial of 17 defendants is without basis in fact or law. The question of how many co-defendants should be tried at one trial is within the discretion of the trial court and there is no support for the claim that that discretion was abused here.

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[5] The *Stromberg* proof showed that Joseph Di Palermo's only link with the conspiracy was Vellucci from whom he purchased heroin; he had no contacts with any of the principal *Stromberg* conspirators and he never had any contact with the Lessas so far as the proof in that case showed.

The rights of each defendant were scrupulously guarded by the trial judge throughout the trial. In the number of extra challenges allowed in the jury selection, the latitude of cross-examination, the one week allowed for defense summations, and the patience show in listening to numerous motions of the many counsel, the trial judge was eminently fair to the point of being overgenerous. Moreover, the court's charge to the jury fairly summarized the evidence, distinguished the case of each defendant and emphasized the requirement of separate consideration of the case as to each defendant. Under these circumstances, there can be no complaint of prejudice from such a joint trial. See *United States* v. *Stromberg*, 268 F. 2d 256, 265 (2 Cir. 1959); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939).

Appellant Genovese complains he was so prejudiced by testimony that he was seen emerging from an automobile on January 17, 1956 at Kenmare and Mulberry Streets in Manhattan as to have necessitated the granting of a mistrial as to him. This testimony was given by Sherman Willse, a member of the staff of the Senate Select Committee on Improper Activities, who in January 1956 was a New York City police officer. This testimony was stricken by the court[6] with clear instructions to the jury to disregard it, although the government stated that it was prepared to show that the automobile was at the time registered in the name of appellant Vincent Gigante.

[6] In our opinion the court erred in excluding the evidence which corroborated Cantellop's testimony of the relationship between Genovese and Gigante as it tended to show that Genovese was driven around by Gigante and it was near enough in time to the events in question.

We cannot see how Genovese was improperly prejudiced by this testimony. We have read it over and conclude that it was utterly meaningless by itself and devoid of the sinister import which appellants seek to attach to it. In any event the striking of the testimony and the court's instruction to the jury cured any possible error in admitting it. Our jury system is founded on the assumption that the jury will adhere to the trial court's instructions to it. See *United States v. On Lee*, 193 F. 2d 306 (2 Cir. 1951), aff'd 343 U. S. 747 (1952). Under the circumstances here present, there is no reason to presume that the jury disregarded the court's instruction.

Appellant Jean Capece complains of the admission of testimony of a customs official that she flew to Cuba on November 20, 1956 with Joseph Di Palermo and Salvatore Benanti and upon her return two days later she had $9,000 in cash concealed in her brassiere. Coming after much evidence showing that Jean Capece worked with Joseph Di Palermo in the distribution of narcotics, that Benanti was a runner for Di Palermo, and that two months earlier, in September 1956, Montanez had advised Di Palermo that no narcotics would be available from Cuba for some time because of the revolution, this testimony was relevant to corroborate Cantellop's story. Moreover, Benanti's use of a false name and address and Jean Capece's three different versions of how she came to possess $9,000 in one hundred dollar bills would hardly support the theory that the two day trip by air was for a vacation. On the contrary, the trip was persuasive independent evidence corroborating Cantellop's testimony, as it was reasonable to conclude that

the three had gone to Cuba to purchase narcotics, although apparently with some lack of success.

We have dealt with the major claims of error advanced by the appellants. The other contentions have so little merit that they do not warrant any discussion. In our opinion Genovese's motions to inspect a statement taken by the United States Attorney from Customs Agent Benjamin Begendorf, for two reports of Narcotic Agent John Enright, and to take depositions of Begendorf and Enright were without the slightest foundation. Neither was called as a government witness and both were available to be called by the defense, who failed to call either. These motions seem to have had no purpose but to delay the trial. The trial judge exhibited commendable patience and courtesy in the face of such maneuvers.

On this appeal two of the defendants have been represented by assigned counsel, Roy L. Reardon for Charles Barcellona and Allen Stim for Ralph Polizzano. These counsel represented the same defendants at trial; in addition Martin Carmichael, Jr. represented Louis Fiano at trial. We commend them for their services so rendered and the high quality of their counsel.

With the exception of Rodriquez, the appellants have all been convicted after an eminently fair trial upon the convincing evidence of several accomplices which evidence was corroborated in important details.

We affirm the judgments of conviction of all appellants, except Benjamin Rodriquez and we reverse his conviction and direct that the indictment be dismissed as to him.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

United States Code, Title 21, Sections 173, 174:

"**§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.** It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may here-

after be imported upon such drugs when imported. • • •

"§ 174. Same; penalty; evidence. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

(*Amendment enacted July 18, 1956, effective on July 19, 1956.*)